COPY

FILE
NOV 16
JOHN F. DAVI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 12

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

MOTION TO AFFIRM

F. J. MELIA
WILLIAM P. HIGGINS
1416 Dodge Street
Omaha, Nebraska 68102
Attorneys for Union Pacific Railroad Company, Appellee

CHARLES W. BURKETT
65 Market Street
San Francisco, California 94105
Attorneys for Southern Pacific Company, Appellee

EARL F. REQUA
FRANK S. FARRELL
1018 Northern Pacific Building
St. Paul, Minnesota 55101
Attorneys for Northern Pacific Railway Company, et al., Appellees

November 13, 1964

Capitol 2-2703 — Sloan Publishing Co., 143 E. 5th St., St. Paul 1, Minn. — Capitol 2-2703

INDEX

	PAGE
Motion to Affirm	1
Statement	2
Argument	6
Conclusion	17
Proof of Service	18

CITATIONS

Cases:	PAGE
Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago, 240 F. 2d 930, aff'd 357 U.S. 77 (1958)	11
Atlantic Coast Line R. Co. v. United States, 284 U.S. 288 (1932)	11
Chicago & N. W. Ry. Co. v. Osborne, 146 U.S. 354 (1892)	14
Chicago, I. & L. Ry. v. United States, 270 U.S. 287 (1926)	10
Chicago, M., St. P. & P. R. Co. v. Spokane, P. & S. Ry. Co., 300 I.C.C. 453, aff'd 182 F. Supp. 81, 366 U.S. 745 (1961)	3
Clinchfield Railway Lease, 90 I.C.C. 113 (1924)	11
Denver & R. G. W. R. Co. v. Union P. R. Co., 351 U.S. 321 (1956)	12
Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 41 F. 559, appeal dismissed 149 U.S. 779 (1893)	14
Nicholson Universal S. S. Co. v. Pennsylvania R. Co., 203 I.C.C. 637 (1934)	13
Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co., 278 I.C.C. 519 (1950)	15

PAGE

Restriction in Routing Between Greenwood and Augusta, 165 I.C.C. 3 (1930) 11
St. Louis S. W. Ry. Co. v. United States, 245 U.S. 136 (1917) 9
Thompson v. United States, 343 U.S. 549 (1952) 3, 12, 15, 16
U. S. v. Great Northern R. Co., 343 U.S. 562 (1952) 12

Statutes:

Act to Regulate Commerce (24 Stat. 380) 8
Hepburn Act (34 Stat. 589) 15
Interstate Commerce Act (49 U.S.C. §§1, et seq.)
Section 1 14
Section 1(4) 3–5, 8, 12–15
Section 3 10
Section 3(1) 13, 14
Section 3(4) 3–6, 10, 12–16
Section 5(2) 9
Section 5(2)(b) 9
Section 5a(4) 12
Section 5b(4) 12
Section 6(1) 12
Section 15 10
Section 15(3) 4, 8, 12–15
Section 15(4) 4, 12, 13
Section 15(8) 12
Judicial Code (Title 28 U.S.C.)
Section 2284 2
Section 2325 2
Mann-Elkins Act (36 Stat. 551) 15
Transportation Act of 1920 (41 Stat. 479, 480, et seq.) 9, 10
Transportation Act of 1940 (54 Stat. 902) 14

PAGE

Miscellaneous:

Interstate Commerce Commission

First Annual Report 1 (1887) 9

Third Annual Report 77, et seq. (1889) 9

Thirteenth Annual Report 6 (1899) 9

Fourteenth Annual Report 11 (1900) 9

77th Annual Report 236 (1963) 9

General Rules of Practice, Section 1.101(3) 6

1 Scharfman, "The Interstate Commerce Commission," pp. 33, 34 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 598

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees, the Northern Pacific Railway Company, Union Pacific Railroad Company, Southern Pacific Company, Camas Prairie Railroad Company and Walla Walla Valley Railway Company,[1] move that the unanimous judgment of the District Court be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument. The opinion of the District Court is reported at 230 F. Supp. 852 and is reproduced at pages 32a through 36a of the Jurisdictional Statement.

[1] Hereinafter referred to as Northern Pacific, Union Pacific, Southern Pacific, Camas Prairie and Walla Walla, respectively.

STATEMENT

This is a direct appeal from a final judgment filed on June 22, 1964, by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§2284 and 2325 dismissing appellants' complaint which sought to set aside an order of the Interstate Commerce Commission. The Commission's decision is reported at 316 I.C.C. 795 and is reproduced at pages 8a through 31a of the Jurisdictional Statement.

For more than half a century, the Northern Pacific and the Union Pacific have maintained a full line of joint through rates with the Southern Pacific via the Portland gateway between points on their lines in the states of Oregon, Washington and Idaho and points in California.[2] Since 1931 appellant, The Western Pacific Railroad Company,[3] The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and the Great Northern Railway Company (Great Northern), have maintained joint through rates over routes through Bieber, California, between stations in California and stations in Oregon, Washington and Idaho on the same basis as those maintained by the Northern Pacific and Union Pacific with the Southern Pacific via the Portland gateway.[4] The Western Pacific connects with the Santa Fe at Stockton, California, on the south and with the Great Northern at Bieber, California, on the north. Bieber, California, is 490 miles south of Portland and 244 miles south of Bend, Oregon, which is served by the Oregon Trunk, a wholly-owned subsidiary of the

---

[2] Hereinafter referred to as the Southern Pacific route.

[3] The Western Pacific Railroad Company and its subsidiary lines, the Sacramento Northern Railway and the Tidewater Southern Railway Company, are hereinafter referred to as Western Pacific or appellant.

[4] Hereinafter referred to as the Bieber route.

Spokane, Portland and Seattle Railway Company (SP&S),[5] and by the Union Pacific.

In addition to the full line of joint rates available over the two major competitive through routes described above, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company maintains joint rates with the Western Pacific through Bieber. Further, the Union Pacific publishes competitive rates to the Los Angeles area over its single-line route via Salt Lake City and also participates in routes with the Western Pacific and Southern Pacific via Utah and Nevada interchanges. (J.S. app. 10a, 11a).[6]

In its complaint to the Commission filed February 10, 1961, appellant alleged that the Northern Pacific, Union Pacific, Great Northern, Santa Fe and their short-line connections had violated both Sections 1(4)[7] and 3(4) of the Interstate Commerce Act, 49 U.S.C. §§1(4), 3(4), and sought an affirmative order requiring the establishment of through routes and joint rates through Bieber, California, via the Portland gateway between stations in California and stations

---

[5] The SP&S is under the common control and management of the Northern Pacific and Great Northern. See *Chicago, M., St. P. & P. R. Co. v. Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, aff'd 182 F. Supp. 81, 366 U.S. 745 (1961).

[6] The Northern Pacific and Union Pacific maintain a few joint rates with the Western Pacific via the sought routes; however, the Commission found, and Western Pacific concedes, that through routes do not exist. See *Thompson v. United States*, 343 U.S. 549, 557 (1952).

[7] 49 U.S.C. §1(4) requires railroads, *inter alia*, to "establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto;" and "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, * * *"

on the Northern Pacific and Union Pacific and their short-line connections in Oregon, Washington and Idaho. The Northern Pacific and Union Pacific denied the allegations and, together with the intervening Southern Pacific, opposed the complaint. The Great Northern and Santa Fe, while indicating a willingness to establish the routes and rates sought, did not submit any evidence and did not brief or argue the case. Following the issuance of an Examiner's proposed report, Division 2 of the Commission found that the public interest did not require the establishment of the sought through routes and joint rates under Sections 1(4) and 15(3) of the Interstate Commerce Act, 49 U.S.C. §§1(4), 15(3),[8] and that the sought routes would, in many instances, short-haul the Northern Pacific and the Union Pacific without their consent, in violation of Section 15(4) of the Interstate Commerce Act, 49 U.S.C. §15(4).[9] (J.S. app. 30a). In addition, the Division found that the Western Pacific is not a "connecting line" of the Northern Pacific and the Union Pacific within the meaning of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4), and that, further, even if it were a connecting line, the evidence of record did not establish the necessary similarity of circumstances and con-

---

[8] 49 U.S.C. §15(3) authorizes the Commission, after full hearing, to establish, *inter alia*, such through routes, joint classifications and joint rates, applicable to the transportation of property by railroad as it finds "necessary or desirable in the public interest" together with the terms and conditions under which such through routes shall be operated.

[9] 49 U.S.C. §15(4) restricts the power of the Commission under paragraph (3) of the same section to require a railroad, without its consent, to embrace less than its entire length, subject to certain exceptions; namely, (a) the through route would be "unreasonably long" or (b) the through route is needed "to provide adequate, and more efficient or more economic, transportation: * * *"

ditions which would justify equality of treatment at the Portland gateway. (J.S. app. 29a).

Following the denial of its petition for reconsideration by Division 2 of the Commission acting as an appellate division, the Western Pacific, in a further petition for reconsideration by the entire Commission, finally abandoned its Section 1(4) allegation, 49 U.S.C. §1(4), and has since relied solely on Section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4). The Commission's order became final with its denial on July 12, 1963, of Western Pacific's petition for further hearing and reconsideration.

Appellant then brought this action in the United States District Court for the Northern District of California seeking to have the Commission's order set aside, contending, *inter alia*, that the Western Pacific was a connecting line of the appellees Northern Pacific and Union Pacific at Portland within the meaning of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4), and that the evidence of record established the necessary similarity of circumstances and conditions sufficient to require equality of treatment at the Portland gateway. The District Court dismissed the complaint holding that the Commission had properly determined that the Western Pacific is not a "connecting line" within the meaning of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4). The Court did not consider it necessary to decide whether the Commission had erred in its finding that the record did not establish the necessary similarity of circumstances and conditions which would justify equality of treatment at the Portland gateway or to resolve the other issues raised by the Western Pacific. (J.S. app. 33a, 34a).

ARGUMENT

The jurisdictional statement presents a single question, namely, whether the entire Commission and a unanimous District Court have properly construed Section 3(4) of the Interstate Commerce Act,[10] 49 U.S.C. §3(4), in holding that the Western Pacific is not a connecting line of the Northern Pacific and Union Pacific at the Portland gateway.

Western Pacific's lines do not extend north of Bieber, California, which is 490 miles south of Portland, Oregon. Moreover, Western Pacific, admittedly, does not participate in through routes with the Northern Pacific and Union Pacific. Patently, therefore, Western Pacific does not meet the requirement that a connecting line "is one which has either a direct physical connection at the common interchange or is one which makes up a 'through route' through the interchange point." (J.S. app. 35a).

The Commission's finding that the instant proceeding presented a question of "general transportation importance" obviously does not establish that the issue here present is substantial. This finding simply permitted appellant to file successive petitions for reconsideration.[11] The first petition was fully considered by Division 2 acting as an appellate division and denied on January 18, 1963. The second petition

---

[10] Hereinafter referred to as Act.

[11] The Commission's General Rules of Practice provide that the right to apply to the entire Commission for reconsideration of a decision or order of a division of the Commission is restricted to those proceedings in which the entire Commission determines that an issue of general transportation importance is involved. In the absence of such a finding, petitions for reconsideration are considered by the division involved acting in its appellate capacity. §1.101(3)

was considered by the entire Commission and denied by order dated July 12, 1963. Such a finding indicates the careful and thorough consideration which this complaint has received before the Commission, rather than the importance of the question here presented.

Appellant further states that the United States recognized its importance "by entering the case before the Commission, * * *" (J.S. 7). While the United States did attempt to intervene in this proceeding before the Commission for the purpose of seeking reconsideration of the report and order of Division 2 on July 26, 1963, two weeks subsequent to the order of the entire Commission denying reconsideration and four days before it was served, and again on August 7, 1963,[12] it filed a completely neutral answer before the District Court on December 16, 1963.

In support of this same theme, appellant erroneously asserts that the District Court "virtually invited this Court to review its decision." (J.S. 8). The decision, of course, speaks for itself; however, we are constrained to quote the following sentence from the concluding paragraph of the Court's opinion:

> "This Court is satisfied that the present definition (of connecting line) fully comports with the statutory purpose, and that any further expansion of the term is not warranted." (J.S. app. 36a)

---

[12] Appellant inadvertently stated in its Jurisdictional Statement p. 7, Footnote 6, that the United States filed three petitions. The United States filed two petitions—one for reconsideration of the order of Division 2 on July 26, 1963, and the second on August 7, 1963, to set aside the order of the entire Commission served July 30, 1964. The first petition was, of necessity, accompanied by a petition in intervention.

Appellant argues variously that establishment of the routes and rates sought will generally assist in the economic growth of the area (J.S. 8); that in this "age of merger" the Bieber route concept should be preserved (J.S. 8, 9); that the existing situation results in uneconomical and wasteful transportation (J.S. 16); that intramodal competition should be enhanced (J.S. 17), and that the interpretation of Section 3(4) of the Act it seeks will provide an answer to the revolutionary transformation now taking place in the railroad industry (J. S. 17). Assuming, *arguendo*, that these assertions are valid, none is relevant. The Commission's order will in no way impede the existing operation of the Bieber route. Moreover, the Commission found that because of the circuity involved, the Western Pacific's proposed new routes would be "substantially slower and costlier than the present routes" (J.S. app. 30a). Finally, the Commission found that the establishment of the requested through routes and joint rates under Sections 1(4) and 15(3) of the Act, 49 U.S.C. §§1(4) and 15(3), was "not shown to be necessary or desirable in the public interest." (J.S. app. 31a). The Western Pacific has not challenged this finding.

As appellant points out, the term "connecting lines" in Section 3(4) of the Act had its genesis in Section 3(2) of the Original Act to Regulate Commerce, 24 Stat. 380, and, despite amendments to the section, the term has not been altered since 1887. (J.S. 9). In appraising appellant's merger argument, it should be noted that the present merger trend is not comparable either in numbers or in total mileage to the mergers and consolidations which occurred during the last two decades of

the Nineteenth Century.[13] Furthermore, in that period we had more small railroads than we do today.[14] Manifestly, as the number of railroad companies decrease and as their size increases, there is less need for expanding the definition of the term "connecting line." Finally, since 1920 the Commission has had plenary jurisdiction over all railroad mergers and consolidations pursuant to Section 5(2) of the Act, 49 U.S.C. §5(2), and it can, and does, impose whatever conditions are necessary to preserve all existing routes and gateways, 41 Stat. 480, et seq.[15]

Further, the case of *St. Louis S. W. Ry. Co. v. United States,* 245 U.S. 136 (1917), is not relevant because it involved an order establishing a reduced joint through rate in lieu of a higher combination rate over existing through routes

---

[13] 1 Scharfman, "The Interstate Commerce Commission," pp. 33, 34 (1947). During the nine-year period, 1880 through 1888, a total of 425 railway companies were consolidated or merged with other companies (Third Annual Report of the Interstate Commerce Commission 77, et seq. (1889)); the "most noticeable and important feature of the railway situation" is the trend toward mergers and consolidations (Thirteenth Annual Report of the Interstate Commerce Commission 6 (1899)); during the 16-month period ending November 1, 1900, more than one-eighth of all the railroad mileage in the country was brought under the control of other lines (Fourteenth Annual Report of the Interstate Commerce Commission 11 (1900)).

[14] In 1886, 700 separate systems controlled 1425 railroad companies (First Annual Report of the Interstate Commerce Commission 1 (1887)), while in 1963, there were only 102 Class I Railroads in the United States, some of which were under common management and control (77th Annual Report of the Interstate Commerce Commission 236 (1963)).

[15] 49 U.S.C. §5(2)(b) authorizes the Commission to enter an order approving a consolidation or merger "upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *"

pursuant to Section 15 of the Act, 49 U.S.C. §15. The order did not establish any through routes because they were already in existence, nor did it have its origin in Section 3 of the Act, 49 U.S.C. §3.

Turning now to the principal question raised in this appeal, Western Pacific, in support of its erroneous contention that neither a direct physical connection nor a through route is required to establish connecting-line status under Section 3(4) of the Act, relies solely on *Chicago, I & L. Ry. v. United States*, 270 U.S. 287 (1926).[16] This case involved simply a request of the South Shore for reciprocal switching arrangements at Michigan City, Indiana; rates were not involved. The three defendants asserted that a difference in transportation circumstances and conditions existed because the only carrier with whom the South Shore enjoyed reciprocal switching arrangements, namely, the Lake Erie & Western, had to switch the South Shore's cars from 1.38 miles to 3.88 miles to the defendants' lines. The Commission properly held that the defendants' refusal to switch plaintiff's cars while switching the traffic of all other lines established a violation of Section 3 of the Act. This Court affirmed, holding that if discrimination exists, the order removing it may extend to every carrier that participates in inflicting the injury. Connecting-line status was neither raised by the parties nor considered by the Commission or the Court. The case has never been cited for the point relied on by the appellants. Finally, Mr. Justice Brandeis wrote this opinion as well as the

---

[16] This case arose under the Transportation Act of 1920 which, unlike the present Act, required "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, * * *" (41 Stat. 479)

opinion six years later in the *Atlantic Coast Line* case, *infra*, on which the Commission and the District Court relied.

In *Atlantic Coast Line R. Co. v. United States*, 284 U.S. 288 (1932),[17] the Court was interpreting the meaning of the term "connecting line" as employed by the Commission in *Clinchfield Railway Lease*, 90 I.C.C. 113 (1924), which required, *inter alia*, in Condition 4 that the lessees "shall not discriminate as to rates, fares, and charges" against carriers then connecting or thereafter connecting with the Clinchfield. The Court held that the Georgia & Florida was a connecting line of the Clinchfield within the meaning of the term as used in Condition 4 because the Clinchfield via the Piedmont & Northern Railway Company, an intermediate carrier, voluntarily participated in through routes and joint rates with the Georgia & Florida. The Court expressedly approved the Commission's definition of "connecting lines" as embracing those lines connecting directly or making up a through route.[18]

Appellant erroneously asserts that a "through route" exists in the instant case in the sense in which the term is used in the *Atlantic Coast Line* case, *supra*. (J.S. 13). In the case at bar, Northern Pacific and Union Pacific, unlike the Clinchfield, do not voluntarily participate in through routes and rates with appellant either directly or through any intermediate carriers. Manifestly, participation by the Western Pacific in a through route with the Santa Fe and Great

---

[17] This Court's definition of a "connecting line" in the *Atlantic Coast Line* case was applied specifically with reference to Section 3(4) in *Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago*, 240 F. 2d 930, 937 (7th Cir.), aff'd 357 U.S. 77 (1958).

[18] *Restriction in Routing Between Greenwood and Augusta*, 165 I.C.C. 3, 15 (1930).

Northern does not establish a through route or connecting-line status with the Northern Pacific or Union Pacific.

Appellant contends that the District Court improperly applied the test prescribed by this Court in *Thompson v. United States*, 343 U.S. 549 (1952), in determining whether a "through route" presently exists. Appellant apparently conceded that the definition of the term "through route" enunciated by this Court in the *Thompson* case, *supra*, is entirely proper for Section 15(4), 49 U.S.C. §15(4), but would have the Court adopt a different definition for the same term if Section 3(4) of the Act is involved. The statutory term "through route" is used throughout the Interstate Commerce Act, as this Court recognized in the *Thompson* case, *supra*.[19] The definition prescribed obviously was not intended to vary depending upon which section of the Act was involved. The same definition of the term "through route" was also applied by this Court in *U. S. v. Great Northern R. Co.*, 343 U.S. 562 (1952), and *Denver & R. G. W. R. Co. v. Union P. R. Co.*, 351 U.S. 321 (1956). Under this test a through route is established by the holding out of two or more carriers to provide through transportation service. The Western Pacific admits that it does not participate in through routes with the Northern Pacific and the Union Pacific. Manifestly, the test was properly applied by the District Court in the instant proceeding.

Appellant erroneously contends that it has a direct physical connection with the Northern Pacific and Union Pacific at the Portland gateway because it constitutes "the essential middle link of the Bieber route, * * *" (J.S. 15, et seq.). This is simply contrary to fact, as the Commission

---

[19] 49 U.S.C. §§1(4), 5a(4), 5b(4), 6(1), 15(3), 15(4) and 15(8).

found when it held that the Western Pacific did not have a direct physical connection with the lines of the Northern Pacific or Union Pacific at Portland or any other point on the Bieber route. (J.S. app. 10a, 26a).

Appellant, in essence, asserts that Section 3(4) of the Act, 49 U.S.C. §3(4), can be utilized to prevent discrimination against a route as distinguished from a connecting line. Appellant has simply failed to properly distinguish between Section 1(4) and paragraphs (1) and (4) of Section 3 of the Act. The duties prescribed by Section 3(4) of the Act extend to connecting lines and not routes. As the Commission stated in *Nicholson Universal S. S. Co. v. Pennsylvania R. Co.*, 203 I.C.C. 637, 647 (1934):

> "Although our power to require the establishment and maintenance of through routes and joint rates has been greatly extended since the enactment of the original Act to Regulate Commerce by section 15(3) and section 6(13) of the present act, *the wording of section 3(3)* [now 3(4)] *has remained substantially the same and does not include within its terms any reference to routes.* * * * (Emphasis supplied.)

If Western Pacific's contention that it has a direct physical connection with the appellees Northern Pacific and Union Pacific at Portland is valid, then every other railroad in the United States, irrespective of where it is situated, also has a direct physical connection with the Northern Pacific and Union Pacific at Portland. Such a construction would permit any railroad to invoke Section 3(4) of the Act, regardless of the need for the establishment of additional routes under Sections 1(4) and 15(3) as limited by Section 15(4) of the Act, simply by asserting that it physically connects with other lines which ultimately connect with the carrier with whom the through routes and joint rates are sought at some

distant gateway; consequently, the failure of the line charged to enter into joint through rates with the complaining line constitutes a violation of Section 3(4) of the Act.

Further, such a construction would result in direct conflict between paragraphs (4) and (1) of Section 3 of the Act, 49 U.S.C. §3(1),(4). Paragraph (1) of Section 3 cannot be invoked by another carrier because of the proviso which makes the section inapplicable to the traffic of any other carrier.[20] This limitation would be meaningless if the term "connecting lines," the subject matter of paragraph (4), is construed to embrace lines which neither physically connect nor presently make up through routes. The construction urged by appellant ignores both the adjective "connecting" and the proviso in paragraph (1) of Section 3 which was added by the Transportation Act of 1940, 54 Stat. 902.

Appellant contends that the Court's construction of Section 3(4) of the Act, 49 U.S.C. §3(4), results in a complete anomoly. (J.S. 14). We submit that when this section is considered in the light of Sections 1(4) and 15(3) of the Act, it is entirely consistent with the legislative pattern. Initially, carriers were under no statutory obligation to maintain through routes and joint rates. No power existed, either at common law or under the original Act, to compel a railroad engaged in interstate commerce to enter into a contract with another carrier for joint through routes and rates. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 F. 559, appeal dismissed 149 U.S. 779 (1893), and *Chicago & N. W. Ry. Co. v. Osborne*, 146 U.S. 354 (1892). This obligation was first prescribed by the

---

[20] 49 U.S.C. §1 concludes: "Provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Hepburn Act of June 29, 1906, which imposed a duty on all carriers to establish through routes and joint rates and authorized the Commission to establish through routes "provided no reasonable or satisfactory through route exists," 34 Stat. 589. The Mann- Elkins Act of June 18, 1910, greatly expanded the Commission's power by authorizing it to establish alternate through routes subject to certain necessary safeguards, 36 Stat. 551. Thus, if a through route is established, either by voluntary action of the carriers involved or Commission order, the provisions of Section 3(4) of the Act apply, notwithstanding the absence of a direct physical connection at a common interchange. However, until a through route is established, a carrier which lacks a direct physical connection at a common interchange must rely on Sections 1(4) and 15(3) of the Act to establish a through route before it can invoke the provisions of Section 3(4) of the Act.

In essence, the Western Pacific is attempting to accomplish indirectly under Section 3(4) of the Act that which it, admittedly, cannot do directly under Sections 1(4) and 15(3) of the Act, namely, establish new through routes and joint rates. The Western Pacific in abandoning before the Commission its claim under Sections 1(4) and 15(3) of the Act conceded that the Commission properly refused to order the establishment of additional through routes pursuant to such sections.

The construction of the term "connecting lines" urged by appellant is subject to the same infirmity as the construction of the term "through routes" which the Commission adopted in the proceeding under review in the *Thompson* case, 343 U.S. 549,[21] namely, that a through route exists if the neces-

---

[21] *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I.C.C. 519 (1950).